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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JEAN FUMERO SOTO, *et al*,
and RAFAEL RIVERA FERNANDEZ, *et al*,
Conditional Cross-Petitioners,

v.

CARLOS CHARDON, *et al*, *Cross-Respondents*.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Where a limitations decision of this Court establishes a new principle of law, where its prospective application will not retard its operation and where substantial inequity and injustice will result from its retroactive application, should that limitations decision be applied prospectively only?

2. Where a federal court applies this Court's *Chevron Oil Company* retroactivity factors, when should it look at the reliance of a litigant on past precedent: at the time a litigant's claim arises, at the time a litigant files his suit, or at the time the new decision comes out?

3. Should the same foreseeability criteria which apply to a § 1983 defendant who raises the objective qualified immunity defense of *Harlow* v. *Fitzgerald* also govern a litigant confronted with an unexpected judicial decision which may apply only prospectively pursuant to *Chevron Oil Company*?

PARTIES TO THE PROCEEDING

The Ninety-One Conditional Cross-Petitioners Are:

A. Thirty-seven Respondents in whose favor the Court of Appeals for the First Circuit entered judgment in one appeal below, Nos. 81-1567 and 1607, and 80-1237 *et al.*[1]

B. Eighteen Cross-Petitioners against whom the Court of Appeals for the First Circuit entered judgment in the same appeal below.[2]

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[1] The group of thirty-seven are:

1) Aurora Sierra Pizarro
2) Virginia Otero Arroyo
3) Juan Fumero Soto
4) Dora Castro de Aguilar
5) Reinaldo Rodriguez Solivan
6) Elba Rosario de Bravo
7) Ramon Norat Zayes
8) Charles H. Quiles Mariani
9) Bienvenido Rivera Diaz
10) Carmen M. Morales Hernandez
11) Juan Rivera Pagan
12) Joaquin Cruz Mendez
13) Ursula Aguilar Quintero
14) Aminta Rivera Cardona
15) Roberto Cruz Cruz
16) nelson Velez Quinones
17) Cristina Cancel Cuevas
18) Maria D. Guerra Navarro
19) Francisco Bonilla Ocasio
20) Heriberto Gallardo Gutierrez
21) Julio E. Colon
22) Aida Rodriguez Rios
23) Jose Ortiz Rivera
24) Carmen Nunez Rivera
25) Carmen L. Negron marin
26) Carmen Garcia Rosado
27) Noelia Torres de Cantres
28) Antonio Rodriguez Rivera
29) Jose E. Aponte de la Torre
30) Carmen H. Montez Velez
31) Nilsa Cardona Flores
32) Elba M. Colon Torres
33) Ana Mercedes Ortiz Colon
34) Sylvia M. Denis
35) Bienvenido Castro del Valle
36) Santiago Gonzalez Velasquez
37) Angela Colon Santiago

[2] The group of eighteen are:

1) Syraida Rosa Cardona
2) Iraida Sanchez Marquez
3) Josefa Marrero Ayala
4) Carmen Ortiz Lemois
5) Carmen D. Perez Roman
6) Antonio Vega Ortiz
7) Kremmly Rodriguez Valentin
8) Angel Luis Marrero Gonzales
9) Iris Camelia Velez Morales
10) Efrain Tacoronte Ortiz
11) Edda I. De Ayala La Fuente
12) Jose A. Alvarado
13) Andres A. Hernandez Ortiz
14) Maria V. Pagan Seda
15) Jose A. Surillo Rodriguez
16) Lydia Munoz Morales
17) Carmen T. Lugo Sotero
18) Jorge O. Principe-Galarza

C. Thirty-six Cross-Petitioners against whom the Court of Appeals for the First Circuit entered judgment in the same appeal below.[3]

The Conditional Cross-Respondents (Who Are Also Petitioners) Are:

Carlos Chardon, individually, Maria Socorro Lacot, as the current Secretary of Public Education for the Commonwealth of Puerto Rico, and Oscar Ramos, individually as the Assistant Secretary of Personnel for the Department of Education of the Commonwealth of Puerto Rico.

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[3] The group of thirty-six are:

1) Rafael Rivera Fernandez
2) Ramon A. Vega Cruz
3) Angel Luis Allende
4) Enrique Diaz Maldonado
5) Aida L. Sanchez de Negron
6) Jose R. Munoz Rivera
7) Gladys Rosado Acevedo
8) Sara Velazquez Concepcion
9) Julia Martinez Vda de Calderon
10) Isaias Torres Sanchez
11) Irma I. Baldoni de Valencia
12) Gaspar Rodriguez Rodriguez
13) Yolanda Anguita de Rios
14) Wilfredo Cintron Santana
15) Carmen Roman de Molina
16) Pahita Guadalupe Garcia
17) Carlos Cruz Beltran
18) Claudio Aviles Navarro
19) Angel L. Arzon Mendez
20) Laura L. Santos Roa
21) Evelyn Irizarry Escobar
22) Jose D. Nieves Rivera
23) Herminia A. Ortiz Ortiz
24) Eduardo Tarafa Gonzalez
25) Roberto Velazquez Nieves
26) Enrique Rosado Alverio
27) Saquia Azize Mawad
28) Miguel Alvelo Rodriguez
29) Manuel Rosas Lebron
30) Aida E. Santiago de Orta
31) Jose M. Rosado Sanchez
32) Ramon A. Perez-Ramirez
33) Blanca Cacho Collazo
34) Aida Lopez de Ferra
35) Fanny Cacho de Freytes
36) Cecilio Alvarez Plajas

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii-iii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS BY WHY THE WRIT SHOULD BE CONDITIONALLY GRANTED	6
1. The First Circuit's Decision Giving Retroactive Effect To This Court's Recent Limitations Decision In *Delaware State College* v. *Ricks* Is In Conflict With This Court's Non-Retroactivity Decision In *Chevron Oil Company* v. *Huson*	6
2. The First Circuit's Decision Giving Retroactive Effect To This Court's Recent Limitations Decision In *Delaware State College* v. *Ricks* Raises Important Issues Which Were Unaddressed By This Court's Non-Retroactivity Decision In *Chevron Oil Company* v. *Huson*, And Which Now Requires Clarification	13
CONCLUSION	15
APPENDIX:	
Class action complaint filed in the case of *Jose Ortiz Rivera* v. *Carlos Chardon*, No. 78-1156	1a
Complaint filed in the case of *Rafael Rivera Fernandez* v. *Carlos Chardon, et al.*, No. 79-165	11a
Order of Court entered by the U.S. Court of Appeals for the First Circuit on February 19, 1982	20a
Judgment entered by the U.S. Court of Appeals for the First Circuit on June 8, 1982	22a

CASES: Page

Bireline v. *Seagondollar*, 567 F.2d 560 (4th Cir. 1977) *cert. denied*, 444 U.S. 842 (1979) 9, 10

Board of Regents v. *Tomanio*, 446 U.S. 478 (1980) ... 14

Bonham v. *Dresser Industries, Inc.*, 569 F.2d 187 (3rd Cir. 1977) *cert. denied*, 439 U.S. 821 (1979) 9

Bradshaw v. *Zoological Society*, 569 F.2d 1066 (9th Cir. 1978) 10

Chardon v. *Fernandez*, 454 U.S. 6 (1981) 2, 5, 10

Chevron Oil Company v. *Huson*, 404 U.S. 97 (1971) ..... *passim*

Delaware State College v. *Ricks*, 449 U.S. 250 (1980) ..... *passim*

Egelston v. *State University College at Genesco*, 535 F.2d 752 (2nd Cir. 1976) 9

Elrod v. *Burns*, 427 U.S. 347 (1976) 12-13

Harlow v. *Fitzgerald*, 102 S. Ct. 2727 (1982) ..... i, 14

Fernandez v. *Chardon*, 648 F.2d 765 (1st Cir. 1981) 5, 6, 7, 10

Jackson v. *Hayakawa*, 605 F.2d 1121 (9th Cir. 1979) . 9

Moses v. *Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975) 10

Maryland v. *Baltimore Radio Show, Inc.*, 338 U.S. 912 (1950) 5, 6

Northern Pipeline Construction Co. v. *Marathon Pipeline Co.*, 102 S. Ct. 2854 11

Pierson v. *Ray*, 386 U.S. 547 (1967) 15

Procunier v. *Navarrette*, 434 U.S. 555 (1978) 15

Rodrigue v. *Aetna Casualty and Surety Co.*, 395 U.S. 352 (1962) 7, 8, 9

United States v. *Kubrick*, 444 U.S. 111 (1979) 10, 14

Wachovia Bank and Trust Company v. *National Student Marketing Corporation*, 650 F.2d 342 (D.C. Cir. 1980) *cert. denied*, 452 U.S. 954 (1981) 13, 14

Wiltshire v. *Standard Oil Company of California*, 652 F.2d 837 (9th Cir. 1981) 12, 13

Table of Authorities Continued

	Page
STATUTES:	
18 L.P.R.A. § 249(e)	3-4
28 U.S.C. § 1254(1)	3
42 U.S.C. § 1983	i, 3, 12, 15
43 U.S.C. § 1331, *et seq.*	7

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v.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Cross-Petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit entered on June 8, 1982, as modified on rehearing on July 6, 1982, insofar as it held that this Court's limitations decision in *Delaware State College* v. *Ricks* should be retroactively applied to these cases. This prayer is made conditionally and only if this Court should grant the Petition for Writ of Certiorari previously requested by Petitioners, Cross-Respondents herein. Cross-Petitioners shall timely file a separate Brief in Opposition to the aforesaid Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the First Circuit dated June 8, 1982, has not been reported, but is reproduced in the Petitioners' Appendix, 7a-37a. The order issued by the First Circuit on July 6, 1982, modifying its opinion of June 8, 1982, is

reproduced in the Petitioners' Appendix, 3a-4a. The orders of the First Circuit entered on July 6, 1982, and July 28, 1982, denying Petitioners' petitions for rehearing, are reproduced in their Appendix, 5a-6a and 1a-2a.

The May 7, 1981 Memorandum Opinion of the United States District Court for the District of Puerto Rico, which was reviewed on appeal by the First Circuit, is reported at 514 F. Supp. 339 (D.P.R. 1981) and reproduced in Petitioners' Appendix, 51a-73a. The District Court's unreported Order of May 7, 1981, which accompanied the foregoing Memorandum Opinion, is reproduced in Petitioners' Appendix, 48a-50a. Also reproduced are the District Court's Order, Petitioners' Appendix, 43a-47a, and Final Order and Judgment, Petitioners' Appendix, 38a-42a, both dated July 24, 1981.

Other opinions entered by the District Courts below, also reviewed on appeal by the First Circuit, are reported at 500 F. Supp. 10 (DPR 1980) and 506 F. Supp. 229 (DPR 1980). The unreported opinions and the judgments entered are printed in the Petition for Writ of Certiorari on file in the *Chardon* v. *Fernandez* case, 454 U.S. 6, No. 81-249 (1981). Cross-Petitioners have not reprinted these unreported opinions and judgments, as it is not necessary to refer to them in order to consider the issues raised by this cross-petition.

JURISDICTION

The judgment of the First Circuit, the court below, was entered on June 8, 1982. Petitioners filed a Petition for Rehearing, which the First Circuit below denied on July 6, 1982. Petitioners' Appendix, 5a-6a. Eight of the Cross-Petitioners timely filed a Petition for Rehearing and Modification of Judgment, which the First Circuit granted on July 6, 1982, and modified its opinion accordingly. Petitioners' Appendix, 3a-4a. Petitioners thereaf-

ter filed a Petition for Rehearing or Modification of Judgment, which the court below denied on July 28, 1982. Petitioners' Appendix, 1a-2a. Petitioners filed a Petition for Writ of Certiorari on August 16, 1982. Cross-Petitioners timely and conditionally filed this Cross-Petition for Writ of Certiorari on September 3, 1982.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 (Supp. IV 1980)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Cross-Petitioners, numbering ninety-one, filed suit on June 19, 1978, pursuant to 42 U.S.C. § 1983, and 18

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[1] The ninety-one Cross-Petitioners emphasize the independent timeliness of their Cross-Petition because the Petitioners' Petition for Writ of Certiorari asks this Court to review the judgment of only thirty-seven of these ninety-one Cross-Petitioners. *See* Statement of the Case, *infra*.

L.P.R.A. 249(e),[2] as part of a proposed class action against certain high officials (Chardon and Ramos, Cross-Respondents) in the Department of Education of the Commonwealth of Puerto Rico alleging political discrimination in employment. Appendix herein, 1a-8a. On the basis of numerosity the District Court denied class certification on August 21, 1978.

After denial of class certification, the Cross-Petitioners filed (i) a Motion for Reconsideration which was denied on September 29, 1978; (ii) an Amended Complaint naming all the plaintiffs which was denied on November 24, 1978; and (iii) a Motion for Reconsideration which was denied on December 11, 1978.

The Ninety-one Cross-Petitioners then filed separate complaints. *See* e.g., Appendix herein, 11a-17a. After lengthy and protracted proceedings, fifty-five of these Cross-Petitioners ("*Fumero Soto*" Plaintiffs) proceeded to a consolidated jury trial on liability alone on January 26, 1981. After a five day trial a unanimous jury found the Cross-Respondents liable for political discrimination. Chardon and Ramos appealed to the First Circuit.

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[2] This Puerto Rico statute is relevant not to this Cross-Petition, but rather to the soon-to-be-filed Brief in Opposition to the Petition for Writ of Certiorari, and will therefore be discussed in that Brief. It reads as follows:

> "The school authorities and all other authorities are hereby enjoined from all discrimination or reprisal against a teacher by reason of his affiliation, creed, and political actions; and it is further forbidden that the circumstances mentioned above be taken into consideration in deciding questions such as transfers, work assignments, salary raises, promotions, scholarships, leaves of absence, and any other matters relative to the teacher's professional work or status."

In the meantime, thirty-six other Cross-Petitioners ("*Fernandez*" Plaintiffs) had their complaints dismissed by the district court as time-barred under Puerto Rico law. These dismissals were reversed by the First Circuit on appeal in *Fernandez* v. *Chardon*, 648 F.2d 765 (1st Cir. 1981) wherein *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980) was distinguished from the *Fernandez* cases. However, this Court granted certiorari and summarily reversed in *Chardon* v. *Fernandez*, 454 U.S. 6 (1981) (3 Justices decenting), holding that *Ricks* was indistinguishable. Neither the First Circuit nor this Court in its *Chardon* opinion addressed the question of the retroactive application of *Ricks* to the *Fernandez* cases.[3]

The *Fumero Soto* cases and the *Fernandez* cases (on remand from this Court) were heard and decided on consolidated appeal. After various petitions for rehearing and modification of judgment were considered, the Court of Appeals for the First Circuit in the fifty-five *Fumero Soto* cases affirmed the liability judgment in favor of those thirty-seven Cross-Petitioners, who had received letters of prospective dismissal or demotion on or after June 17, 1977 and reversed the judgment of those eight-

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[3] The *Fernandez* Plaintiffs raised this retroactivity issue in their subsequent Petition for Rehearing to this Court in *Chardon* v. *Fernandez*, *supra*, which was denied. However, this denial has no conclusive effect on any of the Cross-Petitioners here, including the *Fernandez* Plaintiffs. As the First Circuit stated in response to the Cross-Respondents' argument on this question:

> "Defendants' argument is utterly without merit because surely the denial of a petition for rehearing can have no greater precedential effect than the denial of a petition for certiorari, which is to say none. *See Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (opinion of Frankfurter, J., respecting denial of petition for writ of certiorari)." Petitioners' Appendix, 19a n.7.

een Cross-Petitioners who had received letters of dismissal or demotion before June 17, 1977. Appendix 37a. Additionally, the Court of Appeals held that all thirty-six Cross-Petitioners in the *Fernandez* cases were time-barred, having received their letters of dismissal or demotion before June 17, 1977. *Id.*

As to *all* of the Cross-Petitioners, the Court of Appeals ruled that this Court's limitations decision in *Delaware State College* v. *Ricks*, *supra*, should be retroactively applied. Petitioners' Appendix, 22a-23a. The Court of Appeals also held under Puerto Rico law that a class action asserting a section 1983 claim tolls the Puerto Rican statute of limitations during the pendency of the class action for all purported class members and that when class certification is denied for lack of numerosity, the limitations period begins to run anew. Petitioners' Appendix 18a.

Petitioners have filed a Petition for Writ of Certiorari in this Court asking it to review this latter tolling issue. Cross-Petitioners file this Cross-Petition and ask the Court conditionally to grant certiorari and review the *Ricks* retroactivity issue in the event it decides to review the tolling issue raised by Petitioners. Cross-Petitioners shall also file a timely Brief in Opposition to the Petition for Writ of Certiorari.

REASONS WHY THE WRIT SHOULD BE CONDITIONALLY GRANTED

1. The First Circuit's Decision Giving Retroactive Effect To This Court's Recent Limitations Decision In *Delaware State College* v. *Ricks* Is In Conflict With This Court's Non-Retroactivity Decision In *Chevron Oil Company* v. *Huson*.

In *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980) decided on December 15, 1980, this Court announced a

new federal accrual rule in employment discrimination cases and held that a college professor's employment discrimination causes of action accrued when he was notified of the adverse tenure decision by the college, and not when his terminal contract expired. *Ricks* was decided fully *three and one-half years after* the acts of employment discrimination, directed at Cross-Petitioners, occurred and *two and one-half years after* the *Fernandez* and *Fumero Soto* cases were filed. Nevertheless, the First Circuit held that all thirty-six *Fernandez* cases and all fifty-five *Fumero Soto* cases were governed by *Ricks* retroactively.[4] Cross-Petitioners submit that the First Circuit's reasoning and conclusion are fundamentally in conflict with this Court's non-retroactivity decision in *Chevron Oil Company* v. *Huson*, 404 U.S. 97 (1971).

In *Chevron Oil Company*, this Court was confronted with the applicability of its limitations decision in *Rodrigue* v. *Aetna Casualty and Surety, Co.*, 395 U.S. 352 (1969) to a personal injury suit filed several years before *Rodrigue* under the *Outer Continental Shelf Lands Act*, 43 U.S.C. section 1331 et seq. ("Lands Act"). When the suit was filed, the prevailing federal rule in such suits made general admiralty law, including laches, applicable. However, *Rodrigue*, announced while pretrial discovery proceedings were still underway, held that state limitations law was applicable to such suits. The plaintiff's suit was then dismissed by the District Court, following *Rodrigue*, under the applicable Louisiana one year limitations period.

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[4] Thirty-seven of the *Fumero Soto* cases were nevertheless not time-barred because the applicable Puerto Rico statute of limitations had been tolled in such a manner as to render the complaints in those cases timely filed. *See* Petitioners' Appendix, 15a-18a.

In its decision on this issue, this Court held that *Rodrigue* should not be applied retroactively to the suit before it. It set out a three factor test for cases dealing with the nonretroactivity question:

(1) *"[T]he decision to be applied nonretroactively must establish a new principle of law either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed."*

2. "[T]he merits and demerits in each case [must be weighed] by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."

3. "[T]he inequity imposed by retroactive application [must be weighed] for [w]here a decision of this Court could produce a substantial inequitable result if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." (Emphasis added)

In applying these factors to the case before it and holding that *Rodrigue* was not to be applied retroactively, this Court emphasized the following considerations, which are equally applicable to these cases.

A.

Rodrigue raised an issue of first impression in this Court under the Lands Act whose resolution was not clearly foreshadowed.

Similarly, *Ricks* was a case of first impression in this Court on the issue of accrual of a federal employment discrimination cause of action, whose resolution was not clearly foreshadowed. It is significant that the First Circuit did not even respond to Cross-Petitioners' argument

on appeal that *Ricks* was a case of first impression in this Court. Furthermore, not only was there no relevant prior decision of this Court dealing with this issue, but as discussed next, the prevailing rule in the circuits, *both when the acts of employment discrimination occurred and when these cases were filed*, was clearly to the contrary of *Ricks*.

B.

Rodrigue overturned a long line of decisions holding that admiralty law was applicable to personal injury actions under the Lands Act.

Similarly, *Ricks* drastically changed the prevailing rule in the circuits on the accrual issue — that date of actual change in employment status is the proper accrual time. This is clear from *Ricks* which held that the contrary rule of the Second and Third Circuits, *Egelston* v. *State University College at Genesco*, 535 F.2d 752 (2nd Cir. 1976) and *Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187 (3rd Cir. 1977), *cert denied* 439 U.S. 821 (1979), was no longer good law. *Delaware State College* v. *Ricks*, 449 U.S. at 255. The First Circuit was simply wrong when it described *Bonham*, *supra*, as "at best suggestive" of a contrary accrual rule.

The First Circuit was also wrong as a matter of law in placing undue emphasis on *Birline* v. *Seagondollar*, 567 F.2d 560 (4th Cir. 1977), *cert denied* 444 U.S. 842 (1979) as a relevant pre-*Ricks* case supposedly standing for the *Ricks* rule. For one thing, *Bireline* was decided in December, 1977, *after* the acts of employment discrimination occurred. For another, *Bireline* has been described as a *tolling* case by another circuit, *Jackson* v. *Hayakawa*, 605 F.2d 1121, 1127 (9th Cir. 1979); it contains no reasoning whatever; and it even erroneously calls the

issue before it one of "fact." In addition, *Bireline* was not even cited by this Court in *Ricks* three years later! When taken together with an Eighth Circuit decision, *Moses* v. *Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975), which the First Circuit concedes was "suggestive" of the pre-*Ricks* accrual rule, it is clear that the pre-*Ricks* rule was reasonably relied upon by Cross-Petitioners and the *Ricks* rule itself was not clearly foreshadowed.[5]

Ironically, the First Circuit's prior decision in *Fernandez* v. *Chardon* 648 F.2d 765 (1st Cir. 1981), summarily reversed by this Court in *Chardon* v. *Fernandez* 454 U.S. 6 (1981) (three Justices dissenting), also demonstrates that the prevailing accrual rule in the circuits prior to *Ricks* was one whereby the accrual date was the effective date of demotion. That First Circuit decision actually distinguished *Ricks* from the *Fernandez* cases and held that the pre-*Ricks* accrual rule was both prevailing and sound. If this was the First Circuit's view even after *Ricks*, surely it would have been that court's view had *Ricks* never been decided. Moreover, the fact that the First Circuit applied the pre-*Ricks* rule even after *Ricks* indicates that the *Ricks* rule and its applicability to these cases were not clearly foreshadowed in the case law.

What happened to the plaintiff in *Chevron Oil Company* with respect to a change in the law is strikingly similar, therefore, to what happened to the Cross-

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[5] Further demonstrating the unforeseeability of the *Ricks* rule is the fact that this Court's federal accrual decision in *United States* v. *Kubrick*, 100 S.Ct. 352 (1979), which applied the "discovery" rule to a Federal Tort Claims Act action, was handed down on November 28, 1979, well after these cases were filed. *See also Bradshaw* v. *Zoological Society*, 569 F.2d 1066, 1068 (9th Cir. 1978) which stated that as late as 1978 it was an open question whether federal or state accrual law governed § 1983 actions.

Petitioners in these cases. From the time the plaintiff in *Chevron Oil Company* was injured and until he instituted his lawsuit, "[i]t cannot be assumed that he did or could forsee that this consistent interpretation of the Lands Act would be overturned. The most he could do was to rely on the law as it then was." 404 U.S. at 107. Similarly, there was, until *Ricks* itself, no reason to believe that the prevailing federal accrual rule in employment discrimination actions would be changed. Cross-Petitioners relied on the law as it then was when they filed their suits. Just as was true in *Chevron Oil Company*, retroactive application of *Ricks* to these cases "would deprive [Cross-Petitioners] of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable." 404 U.S. at 108.

Consequently, the First Circuit seriously misunderstood and misapplied this first *Chevron Oil Company* factor when it held that the *Ricks* rule was "clear" when the Cross-Petitioners were notified of their prospective demotions in April 1977. Indeed, under the First Circuit's unduly restrictive application of this factor, this Court's recent non-retroactivity decision in *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, 50 U.S.L.W. 4892 (S.Ct. 6-28-82) would be questionable. After ruling that a certain Congressional grant of jurisdiction to the bankruptcy courts was unconstitutional, this Court went on to hold that its ruling was to be applied prospectively only. Even though there were two *directly conflicting* bankruptcy court decisions on the constitutionality of the challenged federal statute, this Court applied *Chevron Oil Company* and concluded, *inter alia*, that the issue presented was one of first impression whose resolution was not clearly foreshadowed. This conclusion, Cross-Petitioners submit, is equally applicable here.

C.

While the first *Chevron Oil Company* factor—the touchstone of the non-retroactivity issue—was especially misunderstood and misapplied by the First Circuit, the other two *Chevron Oil Company* factors also favor Cross-Petitioners. This Court in *Chevron Oil Company*, reasoning that the primary purpose of absorbing state law as federal law in the Lands Act "was to aid injured employees by affording them comprehensive and familiar remedies," observed that "retroactive application of the Louisiana Statute of Limitations to this case would deprive the [plaintiff] of any remedy whatsoever." It concluded: "To abruptly terminate this lawsuit that has proceeded through lengthy and, no doubt, costly discovery stages for a year would surely be inimical to the beneficent purpose of the Congress."

Similarly, the purposes of the accrual rule announced in *Ricks*—predictability, order, and fairness to the parties—would be furthered more faithfully by a holding of nonretroactivity in these cases. *Wiltshire* v. *Standard Oil Company of California*, 652 F.2d 837 (9th Cir. 1981). In addition, such a holding would not encourage the filing of state claims. *Id.*

Moreover, this Court in *Chevron Oil Company* stressed the drastic and inequitable result that would occur if the plaintiff's suit were barred retroactively by *Rodrigue*. The plaintiff had not "slept on his rights," his "potential redress of his allegedly serious injury" was entitled to protection, and he had gone through "lengthy and, no doubt, costly discovery stages for a year."

Similarly, the Cross-Petitioners here did not sleep on their rights. Also, they are entitled to their day in court for the vindication under 42 U.S.C. § 1983 of their First Amendment rights pursuant to *Elrod* v. *Burns*, 427 U.S.

347 (1976). This is especially significant in light of the fact that fifty-five of these cases already have gone to consolidated jury trial with a resulting finding of liability for political discrimination. Further, the substantial resources expended during the three years from filing through trial in all likelihood far exceed those expended by the plaintiff in *Chevron Oil Company*, who had only gone through discovery at the time his complaint was dismissed as time barred.

For the foregoing reasons, the First Circuit misunderstood and misapplied the *Chevron Oil Company* factors in conflict with *Chevron Oil Company* itself. This is further clearly demonstrated by other circuit court decisions properly applying the *Chevron Oil Company* factors in a very different manner from the First Circuit.[6]

2. The First Circuit's Decision Giving Retroactive Effect To This Court's Recent Limitations Decision In *Delaware State College* v. *Ricks* Raises Important Issues Which Were Unaddressed By This Court's Non-Retroactivity Decision In *Chevron Oil Company* v. *Huson* And Which Now Require Clarification.

The First Circuit's decision in these cases is not only in direct conflict with this Court's decision in *Chevron Oil Company* v. *Huson*, 404 U.S. 97 (1971). These cases also raise important non-retroactivity issues which should be addressed now by this Court for the first time.

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[6] *See*, e.g., *Wachovia Bank and Trust Company* v. *National Student Marketing Corporation*, 650 F.2d 342 (D.C. Cir. 1980) (holding in reliance on *Chevron Oil Company* that its own unforeseeable limitations decision should not be applied retroactively to the federal securities causes of action before it) *and Wiltshire* v. *Standard Oil Company of California*, 652 F.2d 837 (9th Cir. 1981) (holding in reliance on *Chevron Oil Company* that a Supreme Court decision which unexpectedly changed EEOC limitations law to the plaintiff's detriment should not be applied retroactively).

The first issue relates to the question of *timing*. Under the *Chevron Oil Company* test, *when* should a court look at the litigant's claims arose, as asserted in *Wachovia Bank and Trust Co.* v. *National Student Association*, 650 F.2d 342, 347 (D.C. Cir. 1980), *cert denied* 452 U.S. 954 (1981); at the time the litigant filed his suit; or at the time the "new decision comes out," as was apparently done by the First Circuit in these cases? *See* Petitioners' Appendix, 20a-21a and footnote.

Second, these cases provide this Court with an opportunity to clarify the relationship between *Chevron Oil Company* and statute of limitations decisions. Whether such decisions deal with accrual, *e.g.*, *Delaware State College* v. *Ricks*, *supra*, and *United States* v. *Kubrick*, 100 S.Ct. 352 (1979), tolling, or the selection of the appropriate limitations period, e.g., *Board of Regents* v. *Tomanio*, 100 S.Ct. 1790 (1980), they arise with considerable frequency and often, as in these cases, can pose important retroactivity questions. The need to balance the limitations interests in repose and fairness to defendants—reflected in the *Ricks* case—against the interests in fairness and equity to litigants, typically plaintiffs—reflected in *Chevron Oil Company*—demands elaboration by this Court. Without this clarification, resources of litigants and federal courts alike will continue to be expended wastefully.

Third, this Court should clarify the relationship between the first *Chevron Oil Company* factor and the objective qualified immunity test for § 1983 damages liability. Under the latter, "government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights of which a reasonable person would have known.*" *Harlow* v. *Fitzgerald*, 102 S.Ct. 2727, 2738 (1982) (emphasis added). Both the first *Chevron Oil Company* fac-

tor and the "objective" qualified immunity test focus on (1) the difficulty of predicting constitutional and statutory developments in the courts and on (2) fairness to litigants who must often make hard choices based on the law as they perceive it to be, whether they be plaintiffs or defendant government officials.

Just as this Court asserted in *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967) that "a police officer is not charged with predicting the future course of constitutional law," similarly these Cross-Petitioners should not have been charged with predicting the future course of accrual law in *Ricks*. *Compare Procunier* v. *Navarette*, 434 U.S. 555 (1978) where this Court relieved prison officials of § 1983 damages liability as a matter of law because they could not reasonably have known of the existence of the Constitutional right asserted.

CONCLUSION

For these reasons, if the Court should grant the Petition for Writ of Certiorari, then Cross-Petitioners ask this Court to grant their Cross-Petition for Writ of Certiorari to deal with the important *Ricks* retroactively issues presented by this case.

Respectfully submitted,

Counsel of Record
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San Juan, Puerto Rico 00936

SHELDON H. NAHMOD
77 South Wacker Drive
Chicago, Illinois 60606
Tel. (312) 567-5761

Counsel for Cross-Petitioners

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil Action No. 78-1156

TRIAL BY JURY

JOSE ORTIZ RIVERA,

Plaintiff,

vs.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary, in charge of Personnel of Public Education of the Commonwealth of Puerto Rico,

Defendants.

COMPLAINT

TO THE HONORABLE COURT:

NOW COMES the Plaintiff and through his undersigned attorneys very respectfully claims, alleges, and requests as follows:

1. This is a class action for declaratory and injunctive relief, back pay, damages, and other relief arising under the First and Fourteenth Amendments to the United States Constitution; Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, as amended, 42 U.S.C. § 1983; 28 U.S.C. § 2201, 2202; 18 L.P.R.A. § 249(e), and 18 L.P.R.A. 214, *et seq.*

2. The jurisdiction of this Court is founded upon 28 U.S.C. § 1331 and 1343(3) and (4). The amount in controversy exceeds $10,000.00, exclusive of interests and costs.

3. The Plaintiff in this action, which is an action pursuant to Rule 23(a) and 23(b) (1) and (2) of the Federal Rules of Civil Procedures, is Jose Ortiz Rivera, who is a resident of Puerto Rico and an employee of the Department of Public Education of

the Commonwealth of Puerto Rico (referred to hereinafter as "the Department"). Jose Ortiz Rivera brings this action on behalf of himself and the members of the class described in paragraph 20 of this complaint.

4. The Defandants in this action are:

(a) Carlos Chardon, who is, and at all times herein relevant was, the Secretary of Public Education of Puerto Rico. In this capacity, he has ultimate responsibility for the supervision and administration of the Department, including determination of the employment status of the Plaintiff and those in his class. Defendant Chardon is sued in his individual and official capacities.

(b) Oscar Ramos, who is, and at all times herein relevant was, the Assistant Secretary of Public Education in Charge of Personnel of Puerto Rico. In this capacity, he has responsibility for the supervision and administration of personnel matters in the Department, including the determination of the employment status of the plaintiff and those in his class. Defendant Ramos is sued in his individual and official capacities.

5. On November 2, 1976, Puerto Rico held a gubernatorial election. In this election, the candidate of the Popular Democratic Party (referred to hereinafter as the "PDP") was incumbent Governor Rafael Hernandez Colon. Former Governor Hernandez Colon was defeated by Governor Carlos Romero Barcelo, who was the candidate of the New Progressive Party (referred to hereinafter as the "NPP"). Governor Romero Barcelo took office on January 2, 1977.

6. Governor Romero Barcelo appointed Mr. Herman Sulsona as Secretary of Public Education, and Sulsona, in turn, appointed defendant Ramos as Assistant Secretary of Public Education in Charge of Personnel. Both Sulsona and Defendant Ramos assumed their positions on or about January 3, 1977. Both Sulsona and Defendant Ramos are members and active in the affairs of the NPP.

7. On or about March 13, 1977, Mr. Sulsona resigned as Secretary of Public Education, and Governor Romero Barcelo

appointed Defendant Chardon as his successor. Defendant Chardon assumed the position of Secretary of Public Education on or about March 31, 1977. Defendant Chardon is a member and active in the affairs of the NPP.

8. Ortiz Rivera was employed during the 1976-77 school year in a Director position by the Department. To this position he had been promoted on the basis of his merits, from a position in which he did have and enjoy permanent status within the meaning of 18 L.P.R.A. 211 and protected by 18 L.P.R.A. 214, *et seq*. Ortiz Rivera was demoted to his previous position. This last action on the part of Defendants also deprived Ortiz Rivera of his constitutional rights and in particular constituted a violation of his rights under the First and Fourteenth Amendments of the Constitution of the United States. The Director position in which Ortiz Rivera was employed during the 1976-77 school year involved functions of school administration. It was not a policy-making position, and Ortiz Rivera did not participate in the forumlation of policies relating to the operation of the Department. He had to follow policies forumlated at the Department's level.

9. Ortiz Rivera is, and at all times herein relevant was, a member and active in the affairs of the PDP. On information and belief, the defendants are, and at all times herein relevant were, aware of Ortiz Rivera's political association with the PDP, even if they did not know him personally.

10. On or about June 21, 1977, Ortiz Rivera received a letter, dated June 10, 1977, from Julio Cintron Lopez, Director of the Peronnel Division of the Department, removing him from his Director position, effective at the beginning of the 1977-78 school year, and reassigning him to his previous position in the Department. A copy of the aforesaid letter is attached to this complaint as *Attachment A*, and made a part hereof. Ortiz Rivera's permanent position is a classroom teacher position, which is lower in rank and compensation than a Director position, and, therefore, his reassignment constitutes a demotion. On June 30, 1977 Plaintiff wrote a letter to Defendant Chardon, in which he objects his removal from his

position as Director and announces that he is taking the necessary steps towards the corresponding legal action. A copy of such letter is attached to this complaint as *Attachment B*, and made a part hereof.

11. The June 10 letter sets forth no reason for Ortiz Rivera's removal from his Director position, and there was no legitimate reason for such removal. No notice, hearing, nor any other form of due process was awarded in his case.

12. At the beginning of the 1977-78 school year, Ortiz Rivera was actually removed from the Director position in which he was employed during the 1976-77 school year, and demoted to his permanent position in the Department. As of the date of this complaint, he is serving in the latter position.

13. Substantially all of the persons who were employed during the 1976-77 school year without permanent status in locally and/or federally funded positions as Executive Directors, Directors, Assistant Directors, General Supervisors, Zone Supervisors, Superintendents, Assistant Superintendents, and Curriculum Technicians and who were members and/or active in the affairs of the PDP or political parties other than the NPP were removed from their positions at the end of the 1976-77 school year or the beginning of the 1977-78 school year; and substantially all of the persons who were employed during the 1976-77 school year without permanent status in the aforesaid positions and who were not members and/or active in the affairs of the PDP or political parties other than the NPP were not removed.

14. The Director position in which Ortiz Rivera was employed during the 1976-77 school year has been filled for the 1977-78 school year.

15. Ortiz Rivera alleges that the defendants removed him from his Director position at the beginning of the 1977-78 school year and demoted him to his previous position solely because of his political association with the PDP, and that he would not have been removed and demoted but for such association.

16. Ortiz Rivera alleges that the aforesaid action by the Defendants constitutes a violation of his rights under the First and Fourteenth Amendments to the United States Constitution. He also alleges that said action is contrary to and contravenes the rights acquired by him under the provisions of 18 L.P.R.A. 214, *et seq.* He further avers that as a career public servant (empleado publico de carrera) he had the legitimate expectation to remain in the position to which he had been promoted (and from which he was demoted by Defendants) and that he could not be removed or demoted from that position except for cause.

17. The defendants knew, or reasonably should have known, that removing Ortiz Rivera from his Director position and demoting him to his previous position because of his political association with the PDP, was a violation of his rights under the First and Fourteenth Amendments to the United States Constitution. The defendants acted maliciously, willfully, and in wanton and reckless disregard of Ortiz Rivera's constitutional rights when they took the aforesaid action, all in violation of Plaintiff's civil rights as provided in Section 1983, 42 U.S.C.A.

18. The action of the Defendants in removing Ortiz Rivera as stated above constituted a violation of Ortiz Rivera's rights under the First and Fourteenth Amendments to the United States Constitution; constituted a violation of his civil rights as provided in Section 1983, 42 U.S.C.A., and constituted a violation of his rights under the laws of Puerto Rico, specifically (in addition to § 214 mentioned in paragraph 16), under Section 249(a) and (e), of Title 18 L.P.R.A.

Section 249(a) of 18 L.P.R.A. provides as follows:

> "By public school teachers shall be understood, for the purposes of sections 249a-249e of this title, teaching personnel, which includes both the teachers in charge of teaching and special services directly connected with the teaching work, and the officers or employees in technical tasks or in school supervision and administration . . ."

Section 249(e) of 18 L.P.R.A. provides as follows:

> "The school authorities and all other authorities are hereby enjoined from all discrimination or reprisal against a teacher by reason of his affiliation, creed, and political actions; and it is further forbidden that the circumstances mentioned above be taken into consideration in deciding questions such as transfers, work assignments, salary raises, promotions, scholarships, leaves of absence, and any other matters relative to the teacher's professional work or status."

19. Ortiz Rivera invokes the pendent jurisdiction of the Court to hear and decide his claim based upon the above-qouted provisions of Puerto Rico law, and Sections 214, *et seq.* of 18 L.P.R.A.

20. Ortiz Rivera brings this class action on his own behalf and, pursuant to Fed. R. Civ. P. 23(a)(1) and (2), on behalf of all other persons who:

(a) were employed during the 1976-77 school year without permanent status in locally and/or federally funded positions within the Department, pursuant to the definition contained on 249(a) Title 18, L.P.R.A.;

(b) were removed from their positions at the beginning of the 1977-78 school year; and

(c) were members and/or active in the affairs of the PDP or political parties other than the NPP, this being the reason for their removal.

The above-described persons are referred to hereinafter as the Class.

21. The members of the Class reside and work throughout Puerto Rico, and are so numerous, in all probability in excess of one hundred, that it would be impracticable, within the meaning of Fed. R. Civ. P. 23(a)(1), to join all of them in this action.

22. All of the members of the Class, like Ortiz Rivera, were removed from their administrator positions or from the positions enumerated in paragraph 13, solely because of their political association with the PDP or political parties other

than the NPP. Accordingly, there are questions of law or fact common to the Class within the meaning of Fed. R. Civ. P. 23(a)(2).

23. Ortiz Rivera's causes of action are based on the claim that the defendants discriminated against him because of his political association with the PED. then this claim is typical of the claims of the members of the Class within the meaning of Fed. R. Civ. P. 23(a)(3).

24. Since Ortiz Rivera's causes of action and the relief which he seeks necessary would be appropriate for all of the members of the Class, he fairly and adequately will protect the interests of the Class within the meaning of Fed. R. Civ. P. 23(a)(4).

WHEREFORE, the Plaintiff respectfully requests from this Court that it:

1. Declare that the Defendants:

   (a) in removing the Plaintiff and the members of the Class which he represents from the positions in which they were employed during the 1976-77 school year, violated their rights under the First and Fourteenth Amendments to the United States Constitution and under Section 1983 of 42 U.S.C.A.; and also violated their rights under Sections 249(a) and (e) and 214 of Title 18 L.P.R.A.

2. Order that the Defendants:

   (a) reinstate the Plaintiff and the Members of the Class which he represents to the positions in which they were employed during the 1976-77 school year and from which they were dismissed or demoted in violation of their rights under the statutes mentioned in the complaint.

   (b) pay to the Plaintiff and the members of the Class which he represents full back pay for the period from the date of their removal or demotion from the positions in which they were employed during the 1976-77 school year until the date of their

reinstatement to those or other substantially equivalent positions, including prejudgment interests, less any pay received by them from the Department during the period in question.

(c) pay to the Plaintiff and the members of the Class, all damages proximately resulting from defendants' wrongful actions;

(d) pay to the Plaintiff and the members of the Class punitive damages in the amount of $2,500,000.00; and

(e) be enjoined pendente lite and permanently from removing any person from a non-policy making position with the Department because of such person's political association.

3. Award to the Plaintiff and the Class he represents:

(a) costs and reasonable attorneys' fees; and

(b) such other and further relief as this Court shall find to be just and proper.

RESPECTFULLY SUBMITTED. In San Juan, Puerto Rico, this 16th day of June, 1978.

HIRAM R. CANCIO
HARRY R. NADAL ARCELAY
(CANCIO, NADAL & RIVERA)
G.P.O. Box 4966, San Juan, P.R. 00936

LUIS MIRANDA CORREA
Of. 505 -Edif. Asoc. Maestros, Hato Rey, P.R.

LUIS MUNOZ RIVERA
Cond. El Centro I - Of. 607, Hato Rey, P.R.

LUIS E. GANDIA ARGUELLES
Box 20343, Rio Piedras, P.R. 00928

By: HIRAM R. CANCIO
Hiram R. Cancio

COMMONWEALTH OF PUERTO RICO
DEPARTMENT OF EDUCATION
HATO REY, PUERTO RICO
71.2 2-JCL-

(Translation)

Office of the
Secretary of Education

June 10, 1977

Mr. Jose Ortiz Rivera
Through: Regional Director
Arecibo, Puerto Rico

Dear Mr. Ortiz Rivera:

As you know, the appointment to the position you now occupy expires with the termination of the present school year.

While we appreciate your collaboration, it is necessary to remind you that you are correspondingly reinstated to the position in which you have tenure in the system. To this effect our Personnel Division is proceeding to reinstate you to position number 0129 of High School Teacher in the school district of Orocovis effective at the beginning of next school year.

Cordially,

(Signed)
Julio Cintron-Lopez
Director of Personnel Division

CERTIFIED to be a correct
translation prepared by:

/s/
Official Court Interpreter and Translator
United States District Court
for the District of Puerto Rico

June 30, 1977

(Translation)

Hon. Carlos Chardon
Secretary of Education
Department of Education
Hato Rey, Puerto Rico

Dear Mr. Secretary:

I have received a communication from the Department you direct, dated June 10, 1977, signed by Mr. Julio Cintron Lopez, Director of the Personnel Division. I am not in agreement with your decision.

To this effect I have remitted copy of the same to the Puerto Rico Teachers Association so that said organization may instruct its Legal Division to take the necessary action.

Meanwhile, I shall comply with the Order sent by you.

Very attentively,

/s/ JOSE ORTIZ RIVERA
Signature

cc: Mr. Julio Cintron-Lopez
Director of the Personnel Division

Mr. Jose Eligio Velez-Torres
President PRTA

CERTIFIED:
To be a correct translation prepared by:

/s/
Official Court Interpreter and Translator
United States District Court
for the District of Puerto Rico

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil Action No. 79-165

TRIAL BY JURY

RAFAEL RIVERA FERNANDEZ,

Plaintiff,

vs.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary, in charge of Personnel of Public Education of the Commonwealth of Puerto Rico,

Defendants.

COMPLAINT

TO THE HONORABLE COURT:

NOW COMES the Plaintiff and through his undersigned attorneys very respectfully claims, alleges, and requests as follows:

1. This is an action for declaratory and injunctive relief, back pay, damages, and other relief arising under the First and Fourteenth Amendments to the United States Constitution; Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, as amended, 42 U.S.C. § 1983; 28 U.S.C. § 2201, 2202; 18 L.P.R.A. § 249(e), and 18 L.P.R.A. 211, and 18 L.P.R.A. 214, *et seq.*

2. The jurisdiction of this Court is founded upon 28 U.S.C. § 1331 and 1343(3) and (4). The amount in controversy exceeds $10,000.00, exclusive of interest and costs.

3. The Plaintiff in this action is a resident of Puerto Rico and an employee of the Department of Public Education of the

Commonwealth of Puerto Rico (referred to hereinafter as "the Department").

4. The Defandants in this action are:

(a) Carlos Chardon, who is, and at all times herein relevant was, the Secretary of Public Education of Puerto Rico. In this capacity, he has ultimate responsibility for the supervision and administration of the Department, including determination of the employment status of the Plaintiff. Defendant Chardon is sued in his individual and official capacities.

(b) Oscar Ramos, who is, and at all times herein relevant was, the Assistant Secretary of Public Education in Charge of Personnel of Puerto Rico. In this capacity, he has responsibility for the supervision and administration of personnel matters in the Department, including the determination of the employment status of the plaintiff. Defendant Ramos is sued in his individual and official capacities.

5. On November 2, 1976, Puerto Rico held a gubernatorial election. In this election, the candidate of the Popular Democratic Party (referred to hereinafter as the "PDP") was incumbent Governor Rafael Hernandez Colon. Former Governor Hernandez Colon was defeated by Governor Carlos Romero Barcelo, who was the candidate of the New Progressive Party (referred to hereinafter as the "NPP"). Governor Romero Barcelo took office on January 2, 1977.

6. Governor Romero Barcelo appointed Mr. Herman Sulsona as Secretary of Public Education, and Sulsona, in turn, appointed defendant Ramos as Assistant Secretary of Public Education in Charge of Personnel. Both Sulsona and Defendant Ramos assumed their positions on or about January 3, 1977. Both Sulsona and Defendant Ramos are members and active in the affairs of the NPP.

7. On or about March 13, 1977, Mr. Sulsona resigned as Secretary of Public Education, and Governor Romero Barcelo appointed Defendant Chardon as his successor. Defendant Chardon assumed the position of Secretary of Public Educa-

tion on or about March 31, 1977. Defendant Chardon is a member and active in the affairs of the NPP.

8. The Plaintiff mentioned in the caption of this complaint was employed by the Department of Education during the 1976-77 school year, without permanent status; in a locally and/or federally funded position as Intermediate School Director IV. He had been promoted to such position, on the basis of his merits, from a lower position in which he did have and enjoy permanent status within the meaning of 18 L.P.R.A. 211 and was protected by 18 L.P.R.A. 214, *et seq.* Plaintiff was demoted to his previous position, such demotion to take effect at the beginning of the 1977-78 school year. This last action on the part of Defendants also deprived Plaintiff of his constitutional rights and, in particular, constituted a violation of his rights under the First and Fourteenth Amendments of the Constitution of the United States. The aforementioned position in which Plaintiff was employed during the 1976-77 school year involved functions of school administration. It was not a policy-making position, and Plaintiff did not participate in the forumlation of policies relating to the operation of the Department. He had to follow policies forumlated at the Department's level.

9. Plaintiff is, and at all times herein relevant was, member and active in the affairs of the PDP or political parties other than the NPP. On information and belief, the defendants are, and at all times herein relevant were, aware of Plaintiff's political association with its party, even if they did not know him personally.

10. On or about June 1977, Plaintiff received a letter, signed by Julio Cintron Lopez, Director of the Peronnel Division of the Department, removing him from his position, effective at the beginning of the 1977-78 school year, and reassigning him to his previous position in the Department. A copy of the aforesaid letter is attached to this complaint as *Attachment A*, and made a part hereof. Plaintiff's permanent position, to which he was assigned as per the corresponding letter, is lower in rank and compensation than the non permanent he held until

then, and, therefore, his reassignment constitutes a demotion. On or about June 1977, Plaintiff wrote a letter to Defendant Chardon, in which he objects his removal from his position and announces that he is taking the necessary steps towards the corresponding legal action. A copy of such letter is attached to this complaint as *Attachment B*, and made a part hereof.

11. The letter received by Plaintiff sets forth no reason for his removal from the non permanent position he held and there was no legitimate reason for such removal. No notice, hearing, nor any other form of due process was awarded to Plaintiff.

12. At the beginning of the 1977-78 school year, Plaintiff was actually removed from the non permanent position in which he was employed during the 1976-77 school year, and demoted to his permanent position in the Department. As of the date of this complaint, he is serving in the latter position.

13. Substantially all of the persons who were employed during the 1976-77 school year without permanent status in locally and/or federally funded positions as Executive Directors, Directors, Assistant Directors, General Supervisors, Zone Supervisors, Superintendents, Assistant Superintendents, and Curriculum Technicians and who were members and/or active in the affairs of the PDP or political parties other than the NPP were removed from their positions at the end of the 1976-77 school year or the beginning of the 1977-78 school year; and substantially all of the persons who were employed during the 1976-77 school year without permanent status in the aforesaid positions and who were not members and/or active in the affairs of the PDP or political parties other than the NPP were not removed.

14. The supervisory position in which Plaintiff was employed during the 1976-77 school year has been filled for the 1977-78 school year.

15. Plaintiff alleges that the defendants removed him from his supervisory position at the beginning of the 1977-78 school year and demoted him to his previous position solely because of his political association with the PDP or parties other than the

NPP, and that he would not have been removed and demoted but for such association.

16. Plaintiff alleges that the aforesaid action by the Defendants constitutes a violation of his rights under the First and Fourteenth Amendments to the United States Constitution. He also alleges that said action is contrary to and contravenes the rights acquired by him under the provisions of 18 L.P.R.A. 214, *et seq.* He further avers that as career public servant (empleado publico de carrera) he had the legitimate expectation to remain in the position to which he had been promoted (and from which he was demoted by Defendants) and that he could not be removed or demoted from that position except for cause.

17. The defendants knew, or reasonably should have known, that removing Plaintiff from his supervisory position and demoting him to his previous position because of his political association with the PDP or parties other than the NPP, was a violation of his rights under the First and Fourteenth Amendments to the United States Constitution. The defendants acted maliciously, willfully, and in wanton and reckless disregard of Plaintiff's constitutional rights when they took the aforesaid action, in violation of Plaintiff's civil rights, as provided in Section 1983, 42 U.S.C.A.

18. The action of the Defendant in removing Plaintiff as stated above constituted a violation of his rights under the First and Fourteenth Amendments to the United States Constitution; constituted a violation of his civil rights as provided in Section 1983, 42 U.S.C.A., and constituted a violation of his rights under the laws of Puerto Rico, specifically (in addition to § 214 mentioned in paragraph 16 under Section 249(a) and (e), of Title 18 L.P.R.A.

WHEREFORE, the Plaintiff respectfully requests from this Court that it:

1. Declare that the Defendants:

   (a) in removing the Plaintiff from the position in which he was employed during the 1976-77 school year,

violated his rights under the First and Fourteenth Amendments to the United States Constitution and under Section 1983 of 42 U.S.C.A.; and also violated his rights under Sections 249 (a) and (e) and 214, *et seq.* of Title 18 L.P.R.A.

2. Order that Defendants:

   (a) reinstate Plaintiff to the position in which he was employed during the 1976-77 school year and from which he was dismissed or demoted in violation of his rights under the statutes mentioned in the complaint.

   (b) pay to Plaintiff full back pay for the period from the date of his removal or demotion from the positions in which he was employed during the 1976-77 school year until the date of his reinstatement to that or other substantially equivalent position, including prejudgment interests, less any pay received by him from the Department during the period in question.

   (c) pay to the Plaintiff all damages approximately resulting from defendants' wrongful actions;

   (d) pay to the Plaintiff punitive damages in the amount of $50,000.00; and

   (e) be enjoined permanently from removing any person from a non-policy making position with the Department because of such person's political association.

3. Award to Plaintiff:

   (a) costs and reasonable attorneys' fees; and

   (b) such other and further relief as this Court shall find to be just and proper.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 2nd day of January, 1979.

HIRAM R. CANCIO
HARRY R. NADAL ARCELAY
ANA MATILDE NIN TORREGROSA
(CANCIO, NADAL & RIVERA)
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Of. 607
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LUIS E. GANDIA ARGUELLES
Box 20343
Rio Piedras, Puerto Rico 00928

By: ANA MATILDE NIN TORREGROSA
Ana Matilde Nin Torregrosa

COMMONWEALTH OF PUERTO RICO
DEPARTMENT OF EDUCATION
HATO REY, PUERTO RICO

(Translation)

Office of the
Secretary of Education

June 8, 1977

Mr. Rafael Rivera Fernandez
Through: Regional Director
Caguas, Puerto Rico

Dear Mr. Rivera Fernandez:

As you know the appointment to the position you now occupy expires with the termination of the present school year.

While we appreciate your collaboration, it is necessary to remind you that you are correspondingly reinstated to the position in which you have tenure in the system. To this effect our Personnel Division is proceeding to reinstate you to position number 0144 of Elementary Principal in the school district of Naranjito, effective on July 1st, 1977.

Cordially,

(Signed)
Julio Cintron-Lopez
Director of Personnel Division

Note: By reason of the reinstatement of the holder-in-fact.

Note: I received this notification on June 15, at 8:30 A.M.

CERTIFIED:
To be a correct translation prepared by:

Official Court Interpreter and Translator
United States District Court
for the District of Puerto Rico

June 18, 1977

(Translation)

Hon. Carlos Chardon
Secretary of Education
Department of Education
Hato Rey, Puerto Rico

Dear Mr. Secretary:

I have received a communication from the Department you direct, dated June 8, signed by Mr. Julio Cintron Lopez, Director of the Personnel Division. I am not in agreement with your decision.

To this effect I have remitted copy of the same to the Puerto Rico Teachers Association so that said organization may instruct its Legal Division to take the necessary action.

Meanwhile, I shall comply with the Order sent by you.

Very attentively,

/s/ RAFAEL RIVERA FERNANDEZ
Signature

cc: Mr. Julio Cintron Lopez
Director of the Personnel Division

Mr. Jose Eligio Velez-Torres
President PRTA

CERTIFIED:
To be a correct translation prepared by:

/s/
Official Court Interpreter and Translator
United States District Court
for the District of Puerto Rico

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1237*

RAFAEL RIVERA FERNANDEZ,
Plaintiff, Appellant,

v.

CARLOS CHARDON, ETC., ET AL.,
Defendants, Appellees.

ORDER OF COURT

Entered: February 19, 1982

The cases having been remanded to this court for further proceedings, *Chardon* v. *Rivera Fernandez*, ____ U.S. ____, 50 U.S.L.W. 3341 (November 2, 1981), the parties are hereby directed to file briefs limited to the issue of whether the running of the limitation period was tolled, and whether that question should be certified to the Supreme Court of Puerto Rico. Briefs should be filed simultaneously within three weeks.

By the Court,

Clerk.

*This order covers the following additional cases:

No. 80-1238, Angel L. Arzon Mendez v. Carlos Chardon, et al.
No. 80-1245, Ramon A. Vega Cruz v. Carlos Chardon, et al.
No. 80-1247, Laura L. Santos Rou v. Carlos Chardon, et al.
No. 80-1249, Angel Luis Allende v. Carlos Chardon, et al.
No. 80-1254, Evelyn Irizarry Escobar v. Carlos Chardon, et al.
No. 80-1339, Enrique Diaz Maldonado v. Carlos Chardon, et al.
No. 80-1340, Jose D. Nieves Rivera v. Carlos Chardon, et al.
No. 80-1341, Aida L. Sanchez de Negron v. Carlos Chardon, et al.
No. 80-1342, Herminia A. Ortiz Ortiz v. Carlos Chardon, et al.

No. 80-1343, Jose R. Munoz Rivera v. Carlos Chardon, et al.
No. 80-1344, Eduardo Tarafa Gonzalez v. Carlos Chardon, et al.
No. 80-1345, Gladys Rosado Acevedo v. Carlos Chardon, et al.
No. 80-1392, Roberto Velazquez Nieves v. Carlos Chardon, et al.
No. 80-1404, Sara Velazquez Concepcion v. Carlos Chardon, et al.
No. 80-1506, Cecilio Alvarez Plajas v. Carlos Chardon, et al.
No. 80-1507, Enrique Rosado Alverio v. Carlos Chardon, et al.
No. 80-1508, Julia Martinez Vda de Calderon v. Carlos Chardon, et al.
No. 80-1509, Saquia Azize Mawad v. Carlos Chardon, et al.
No. 80-1510, Isaias Torres Sanchez v. Carlos Chardon, et al.
No. 80-1511, Miguel Alvelo Rodriguez v. Carlos Chardon, et al.
No. 80-1512, Irma I. Baldoni de Valencia v. Carlos Chardon, et al.
No. 80-1513, Manuel Rosas Lebron v. Carlos Chardon, et al.
No. 80-1640, Gaspar Rodriguez Rodriguez v. Carlos Chardon, et al.
No. 80-1830, Aida E. Santiago de Orta v. Carlos Chardon, etc., et al.
No. 80-1839, Yolanda Anguita de Rios v. Carlos Chardon, et al.
No. 80-1840, Jose M. Rosado Sanchez v. Carlos Chardon, etc., et al.
No. 80-1844, Wilfredo Cintron Santana v. Carlos Chardon, et al.
No. 80-1848, Ramon A. Perez-Ramirez v. Carlos Chardon, et al.
No. 81-1001, Carmen Roman de Molina v. Carlos Chardon, et al.
No. 81-1002, Blanca Cacho Collazo v. Carlos Chardon, etc., et al.
No. 81-1003, Pahita Guadalupe Garcia v. Carlos Chardon, etc., et al.
No. 81-1004, Aida Lopez de Ferra v. Carlos Chardon, etc., et al.
No. 81-1006, Carlos Cruz Beltran v. Carlos Chardon, etc., et al.
No. 81-1008, Fanny Cacho de Freytes v. Carlos Chardon, etc., et al.
No. 81-1194, Claudio Aviles Navarro v. Carlos Chardon, etc., et al.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1237*

RAFAEL RIVERA FERNANDEZ,
Plaintiff, Appellant,

v.

CARLOS CHARDON, ETC., ET AL.,
Defendants, Appellees.

JUDGMENT

Entered: June 8, 1982

This cause came on for reconsideration on remand from the Supreme Court of the United States.

Upon consideration whereof, It is now here ordered, adjudged, and decreed as follows: The judgment of the District Court is vacated and the cause is remanded to the District Court with instructions to dismiss.

No costs to any party.

By the Court:

/s/ DANA H. GALLUP
Dana H. Gallup
Clerk.

[cc: Messrs. Nadal Arcelay, Nahmod, Cordova, Mss. Worthy and Eguia Maranda]

*Identical judgments were entered on the same date in the cases of:

Angel L. Arzon Mendez	(80-1238)
Ramon A. Vega Cruz	(80-1245)
Laura L. Santos Roa	(80-1247)

Angel Luis Allende	(80-1249)
Evelyn Irizarry Escobar	(80-1254)
Enrique Diaz Maldonado	(80-1339)
Jose D. Nieves Rivera	(80-1340)
Aida L. Sanchez de Negron	(80-1341)
Herminia A. Ortiz Ortiz	(80-1342)
Jose R. Munoz Rivera	(80-1343)
Eduardo Tarafa Gonzalez	(80-1344)
Gladys Rosado Acevedo	(80-1345)
Roberto Velazquez Nieves	(80-1392)
Sara Velazquez Concepcion	(80-1461)
Cecilio Alvarez Plajas	(80-1506)
Enrique Rosado Alverio	(80-1507)
Julia Martinez Vda de Calderon	(80-1508)
Saquia Azize Mawad	(80-1509)
Isaias Torres Sanchez	(80-1510)
Miguel Alvelo Rodriguez	(80-1511)
Irma I. Baldoni de Valencia	(80-1512)
Manuel Rosas Lebron	(80-1513)
Gaspar Rodriguez Rodriguez	(80-1640)
Aida E. Santiago de Orta	(80-1830)
Yolanda Anguita de Rios	(80-1839)
Jose M. Rosado Sanchez	(80-1840)
Wilfredo Cintron Santana	(80-1844)
Ramon A. Perez-Ramirez	(80-1848)
Carmen Roman de Molina	(81-1001)
Blanca Cacho Collazo	(81-1002)
Pahita Guadalupe Garcia	(81-1003)
Aida Lopez de Ferra	(81-1004)
Carlos Cruz Beltran	(81-1006)
Fanny Cacho de Freytes	(81-1008)
Claudio Aviles Navarro	(81-1194)

No. 96-1838

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JUAN PEDRO SOTO, *et al.*, and
RAFAEL RIVERA FERNANDEZ, *et al.*,
Conditional Cross-Petitioners

v.

CARLOS CHARDON, *et al.*, *Cross-Respondents*.

On Conditional Cross-Petition For Writ Of Certiorari
To The United States Court Of Appeals For The First Circuit

CROSS-RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
REASONS FOR DENYING THE WRIT	1
I. THE THIRTY-SIX *FERNANDEZ* CROSS-PETITIONERS ARE BARRED FROM REVIEW BY A PREVIOUS DECISION OF THIS COURT	3
II. CROSS-PETITIONERS' ARGUMENTS FAIL TO SATISFY THE STANDARDS WHICH MUST BE MET TO JUSTIFY NON-RETROACTIVITY	4
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:	Page
American Pipe & Construction Co. v. *Utah*, 414 U.S. 538 (1974)	7
Bireline v. *Seagondollar*, 567 F.2d 260 (4th Cir. 1977), *cert. denied*, 444 U.S. 842 (1979)	5
Board of Regents v. *Tomanio*, 446 U.S. 478 (1980)	7
Burnett v. *New York Central Railroad Co.*, 380 U.S. 424 (1965)	7
Chardon v. *Fernandez*, 454 U.S. 6 (1981)	1, 3
Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971)	2, 4, 6, 7, 8
Delaware State College v. *Ricks*, 449 U.S. 250 (1980)	1, 3, 4, 5, 6, 7, 8, 9, 10
Egelston v. *State University College at Geneseo*, 535 F.2d 752 (2d Cir. 1976)	5
Gulf Offshore Co. v. *Mobil Oil Corp.*, 453 U.S. 473 (1981)	4
Johnson v. *Lehman*, 679 F.2d 918 (D.C. Cir. 1982)	4
Miro Martinez v. *Compania Trasatlantica Espanola, S.A.*, 643 F.2d 897 (1st Cir. 1981)	4
Northern Pipeline Construction Co. v. *Marathon Pipe Line Co.*, ___ U.S. ___, 102 S.Ct. 2858 (1982)	6
Order of Railroad Telegraphers v. *Railway Express Agency, Inc.*, 321 U.S. 342 (1944)	7
Rodrigue v. *Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969)	6, 8
Rubin v. *O'Koren*, 644 F.2d 1023 (5th Cir. 1981)	5
Thorpe v. *Housing Authority of the City of Durham*, 393 U.S. 268 (1969)	4
United Air Lines, Inc. v. *Evans*, 431 U.S. 553 (1977)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-383

JUAN FUMERO SOTO, *et al.*, and
RAFAEL RIVERA FERNANDEZ, *et al.*,
Conditional Cross-Petitioners,

v.

CARLOS CHARDON, *et al.*, *Cross-Respondents.*

On Conditional Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

CROSS-RESPONDENTS' BRIEF IN OPPOSITION

Pursuant to Rule 22 of this Court's Rules, cross-respondents[1] submit this Brief in Opposition to Cross-Petitioners' Conditional Cross-Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

In its opinion of June 8, 1982, the court below addressed cross-petitioners' argument that this Court's decision in *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), as applied in *Chardon* v. *Fernandez*, 454 U.S. 6 (1981),

[1] Cross-respondents herein are petitioners for a writ of certiorari in No. 82-271. Cross-petitioners herein seek a writ of certiorari only if the Court grants the petition in No. 82-271.

should not be applied retroactively in these cases.[2] Appendix to Petition for Certiorari, 18a-23a.[3] After carefully considering the test established by this Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), the court below concluded:

> "We cannot say that *Ricks* established a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression."
>
> * * *
>
> "Moreover, given the at best unsettled state of the law on accrual before *Ricks*, retroactive application would not disrupt expectations of either party. There would also seem to be little impact on the administration of justice whether or not *Ricks* is applied retroactively. The second test of *Chevron Oil* thus does not require non-retroactivity."
>
> * * *
>
> "The expenditure of time and energy in the *Fumero Soto* case is regrettable, but the limitations problem had been recognized before the case was tried on its merits. We are unpersuaded that equity requires *Ricks* to be applied prospectively only, and we hold *Ricks* applies retroactively." Appendix to Petition for Certiorari, 21a, 22a, 22a-23a.

The court below correctly applied the *Chevron Oil* test, and its decision is consistent with decisions of other federal courts as well. Accordingly, the Conditional Cross-Petition should be denied.

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[2] The decision of the court below, not reported at the time the Petition for Writ Certiorari in No. 82-271 was filed, now appears at 681 F.2d 42 (1st Cir. 1982).

[3] All references to the "Petition for Certiorari" refer to the Petition filed in No. 82-271.

I. The Thirty-Six *Fernandez* Cross-Petitioners Are Barred From Review By A Previous Decision Of This Court.

Thirty-six of the cross-petitioners herein were previously before this Court as respondents in *Chardon* v. *Fernandez*, 454 U.S. 6 (1981) (per curiam). In that case, this Court applied *Ricks* and held that their causes of action accrued on the dates they were notified that they were not being reappointed to their temporary administrative positions for the 1977-78 school year, not on the later dates when the non-reappointment decisions took effect. 454 U.S. at 8. Therefore, this Court has already applied its decision in *Ricks* to the thirty-six *Fernandez* cross-petitioners and the issue is closed as to them.[4]

---

[4] In *Chardon* v. *Fernandez*, *supra*, respondents (the thirty-six *Fernandez* cross-petitioners herein) petitioned this Court for rehearing, advancing almost verbatim the non-retroactivity argument made in the instant Cross-Petition. The Petition for Rehearing was denied, ___ U.S. ___, 102 S. Ct. 1042 (1982). Cross-Petitioners now assert that, "this denial has no conclusive effect on any of [them], including the *Fernandez* [cross-petitioners]," because of the ruling of the court below that "surely the denial of a petition for rehearing can have no greater precedential effect than the denial of a petition for certiorari, which is to say none." Cross-Petition at p. 5 n. 1 (citations omitted). Cross-Petitioners' argument, however, is misleading. The quoted language from the First Circuit's opinion was made in reference to the non-retroactivity argument advanced by the fifty-five *Fumero Soto* cross-petitioners. *See* Appendix to Petition for Certiorari, 18a-19a. There can be no serious question that this Court's decision in *Chardon* v. *Fernandez* precludes the review on retroactivity sought by the *Fernandez* cross-petitioners here.

II. Cross-Petitioners' Arguments Fail to Satisfy The Standards Which Must Be Met To Justify Non-Retroactivity.

In support of their argument that the court below erred in failing to apply this Court's decision in *Ricks* prospectively only, cross-petitioners rely on *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). They assert that the three-part non-retroactivity test established in *Chevron Oil* was not correctly understood or applied by the First Circuit. The care and thoroughness of the analysis of the retroactivity issue by the court below belies this assertion. Moreover, review of the applicable law shows cross-petitioners' reliance on *Chevron Oil* to be misplaced.[5]

A.

In *Chevron Oil* this Court identified three separate factors to be considered in addressing non-retroactivity. As to the first:

> "[T]he decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression

---

[5] It is a well-established rule that appellate courts must rule in accordance with the law in effect at the time of their decision. *See, e.g., Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 486 n. 16 (1981); *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 281 (1969); *Johnson* v. *Lehman*, 679 F.2d 918, 920 (D.C. Cir. 1982). As the court below noted recently, "it is normal practice for rules of decision in cases to be applied retroactively." *Miro Martinez* v. *Compania Trasatlantica Espanola, S.A.*, 643 F.2d 897, 899 (1st Cir. 1981). In light of these principles, the burden of persuasion on cross-petitioners in arguing for non-retroactivity is necessarily a heavy one. They did not meet this burden below, and have not met it here.

whose resolution was not clearly foreshadowed." 404 U.S. at 106 (citations omitted).

As the court below correctly noted, "the weight of authority [on the accrual issue] is far less than plaintiffs suggest." Appendix to Petition for Certiorari, 20a. Indeed, as the court pointed out, only two of the cases cited by cross-petitioners are factually analogous to the instant cases. In *Bireline* v. *Seagondollar*, 567 F.2d 260 (4th Cir. 1977), *cert. denied*, 444 U.S. 842 (1979), the Fourth Circuit held that a college professor's cause of action under Section 1983 for an allegedly discriminatory discharge accrued on the date she was notified of termination—a ruling correctly cited by the court below as entirely consistent with this Court's later decision in *Ricks*. In *Egelston* v. *State University College at Geneseo*, 535 F.2d 752 (2d Cir. 1976), the Second Circuit ruled that a college professor's Title VII action for gender discrimination, including discharge, accrued when her discharge was consummated and not on the earlier date when she received notice of termination.[6] In light of the contrasting results of the only two factually similar cases, the lack of uniformity in the holdings in other cases cited below by cross-petitioners (*See* Appendix to Petition for Certiorari, 20a-21a), and the absence of any prior decision by the First Circuit involving this or similar issues, cross-

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[6] Even the *Egelston* case does not squarely support the position of cross-petitioners, since the plaintiff in that case alleged a number of discriminatory acts, some of which were continuing in nature and thus victimized her until the day she stopped working. 535 F.2d at 754-55. In this regard, *see also Rubin* v. *O'Koren*, 644 F.2d 1023 (5th Cir. 1981), where on rehearing after *Ricks* was decided by this Court, it was distinguished by the Court of Appeals on the ground that the plaintiff's complaint alleged numerous discriminatory acts, some of which occurred after the date of notice of termination.

petitioners fall far short of demonstrating that *Ricks* overruled clear past precedent prevailing at the time cross-petitioners' suits were filed.[7]

Furthermore, cross-petitioners reach too far in their assertion that "*Ricks* was a case of first impression in this Court . . . whose resolution was not clearly foreshadowed." Conditional Cross-Petition at p. 8. Indeed, in *Ricks*, this Court cited its decision in *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), as support for the propositions that "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination," 449 U.S. at 257, and that "[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts become most painful." 449 U.S. at 258 (citation omitted). Thus, not only did *Ricks* not overrule clear past precedent, but the decision itself was foreshadowed by this Court's earlier decision in *United Airlines*. Cross-Petitioners' argument thus fails under the first *Chevron Oil* factor.[8]

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[7] This is in marked contrast to the *Chevron Oil* case. There this Court noted that its decision in *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), which it determined should not be applied retroactively, "effectively overruled a long line of decisions by the Court of Appeals for the Fifth Circuit . . . [which] [w]hen the respondent was injured, for the next two years until he instituted his lawsuit, and for the ensuing year of pretrial proceedings . . . represented the law governing his case." 404 U.S. at 107 (citations omitted).

[8] This Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, ___ U.S. ___, 102 S. Ct. 2858 (1982), cited in the Cross-Petition at p. 11, does not suggest a different conclusion. That case presented "an unprecedented question of interpretation of Article III," 102 S. Ct. at 2880, thus justifying non-retroactive application of the decision therein. No such situation is presented here.

B.

As to the second factor, this Court in *Chevron Oil* stated:

> "[W]e must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its application." 404 U.S. at 106-07 (citation omitted).

The court below, in considering this second factor, concluded as follows:

> "Retroactive application of *Ricks* would give greater protection to defendants' repose without unduly limiting plaintiffs' ability to sue. Moreover, given the at best unsettled state of the law on accrual before *Ricks*, retroactive application would not disrupt expectations of either party. There would also seem to be little impact on the administration of justice whether or not *Ricks* is applied retroactively. The second test of *Chevron Oil* thus does not require non-retroactivity." Appendix to Petition for Certiorari, 22a.

This conclusion is manifestly correct. The *Ricks* decision is entirely consistent with this Court's previous decisions stressing the importance of the policy of repose embodied in statutes of limitations. *See Board of Regents* v. *Tomanio*, 446 U.S. 478, 487-89 (1980); *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 554-55 (1974); *Burnett* v. *New York Central Railroad Co.*, 380 U.S. 424, 428 (1965); *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). Moreover, as noted earlier, no clear or prevailing body of past precedent contrary to the *Ricks* rule existed which would have justified reliance by cross-petitioners on some other

approach. Thus, under the second *Chevron Oil* factor, cross-petitioners' arguments also fail.[9]

C.

In *Chevron Oil* this Court concluded as follows:

> "Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice and hardship' by a holding of non-retroactivity.' " 404 U.S. at 107 (citation omitted).

The conclusions of the court below clearly refute cross-petitioners' assertions of "substantial inequitable results" due to the application of *Ricks*.

> "Neither group of plaintiffs advance any reason . . . as to why they waited so long before filing suit, thereby risking a time bar if the date of notice of demotion were to become the accrual date. . . . The expenditure of time and energy in the *Fumero Soto* case is regrettable, but the limitations problem had

---

[9] Cross-petitioners rely on language from the *Chevron Oil* decision which they claim demonstrates that analysis under the second *Chevron Oil* factor favors them. The cases, however, are very different. In *Rodrigue* v. *Aetna Casualty & Surety Co.*, *supra*, the Court's decision was meant to benefit plaintiffs by affording them comprehensive and familiar remedies. 395 U.S. at 361, 365. The Court in *Chevron Oil* thus noted the anomaly that would result if *Rodrigue* was applied retroactively, since it would make that plaintiff's action time-barred. In this case, however, as noted by the court below, the *Ricks* rule was designed "to give greater protection to defendants' repose without unduly limiting plaintiffs' ability to sue." Thus, in the instant cases, it would be anomalous if the *Ricks* rule *did not* apply, particularly since there was no basis for justifiable reliance by cross-petitioners on any other rule.

been recognized before the case was tried on its merits." Appendix to Petition for Certiorari, 22a-23a.

As the court below correctly noted, defendants (cross-respondents herein) raised the statute of limitations as an affirmative defense in their answers to each complaint filed by cross-petitioners in the district court. Appendix to Petition for Certiorari, 12a n.5. While the district court reserved decision on this issue in the fifty-five consolidated *Fumero Soto* cases, all cross-petitioners have been confronted throughout this entire litigation with the possibility that "the one established principle . . . that a civil rights cause of action accrue[s] when plaintiff knew or had reason to know of his or her injury" (Appendix to Petition for Certiorari, 20a) could be resolved against them by the courts. Their "equitable" arguments, based on the time and money expended in the litigation in the district court, are thus unpersuasive. Obviously, if these issues had been resolved at the outset, the time and expense of this litigation would have been less for *both* sides.

Finally, in addition to the points made by the court below, another flaw exists in cross-petitioners' asserted reliance on an alleged "established rule" of accrual prior to *Ricks*. The history of this case is recounted in the Statement of the Case in the Petition for Certiorari at 3-8. It shows that the initial complaint, asserting a class action, was filed by Jose Ortiz Rivera on June 19, 1978. Class certification was denied on August 21, 1978, because the asserted class was not so numerous as to make joinder impracticable. The remaining plaintiffs (cross-petitioners herein) filed complaints on dates between January 10 and January 31, 1979. Thus, it is clear that they could not have been relying on some putative "prevailing rule in the Circuits" which was overruled by *Ricks*. Their

complaints were time-barred whether *Ricks* applied retroactively or not.[10] Cross-petitioners fail to advance any justifiable reliance or inequitable result that would justify non-retroactivity in this case.

CONCLUSION

For these reasons the Conditional Cross-Petition should be denied.

Respectfully submitted,

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[10] Only as a result of the unprecedented and novel interpretation of Puerto Rico tolling rules by the court below (review of the choice and application of which is sought by cross-respondents in their petition for certiorari in No. 82-271) have the complaints of *any* of the cross-petitioners, except Ortiz Rivera, been held to have been timely filed.